proper judgment of dismissal under section 58 id of the Code of Civil Procedure (requiring all dismissals to be signed by court). We exercise our discretion to deem the July 7, 2003 dismissal to incorporate a judgment of dismissal so as to reach the merits (see Francis v. Dun & Bradstreet, Inc. (1992) 3 Cal.App.4th 535, 539); no good reason appears in this case not to do so. As to the argument that the substantive loss on the 2002 case, with its largely duplicative causes of action, is res judicata and therefore makes this appeal moot, the simple answer is that res judicata requires a final judgment, and the 2002 case is not yet final.

on Finnegan's behalf. Thomason streamlined the causes of action, reducing them to four, of which three (trespass, negligence and nuisance) had been in his original complaint. However, Thomason included a new cause of action for third-party breach of contract on the theory that when the De Franciscos contracted to have work done on their property, Finnegan was an implied third-party beneficiary. The De Franciscos answered that complaint the next month.

However, soon after filing the third amended complaint Thomason experienced some sort of emotional breakdown or depression (the record is not specific in that regard), and nothing happened in the 1998 case (case number *794705)* until its dismissal in 2003.

However, in February 2002 (with more than a year to go on the 1998 action), Finnegan filed *another* action (as a pro per again) in Orange County Superior Court, case number 02CC03282. The pleading was virtually identical to the third amended complaint filed in the 1998 action except that the 2002 complaint made reference to a new landslide that occurred on February 26, 2001.

The De Franciscos filed a motion to consolidate the two cases. The trial court granted the motion to consolidate and designated the 1998 case number as the lead number. On May 9, 2003, they filed a motion to dismiss the 1998 case. The judge granted the motion and Finnegan appeals from the ensuing judgment of dismissal.

III. DISCUSSION

Finnegan presents three major attacks on the dismissal of the 1998 case: Miscalculation of when the five years began; a need for

tolling; and a violation of due process. We take each challenge in order.

A. *Proper Calculation of When The Five Years Began*

Finnegan first argues that the five-year time period began to run not when he filed his initial complaint in 1998, but when he filed his third amended complaint in 1999. In essence, his position is that by virtue of including a *new claim* in his third amended complaint, he was starting his case anew.

If the De Franciscos had been involved in an auto accident with Finnegan after the landslide, the new claim might indeed have started running with the amended complaint. But that's not this case. The rule in California is that claims which derive from the same nucleus of operative facts or the same transaction *relate back* to the time of initial filing. *(Norgart V. Upjohn Co.* (1999) 21 Cal.4th 383; *Barrington V. A.H. Robins Co.* (1985) 39 Cal.3d 146, 150-151; *Smeltzley V. Nicholson Mfg. Co.* (1977)18 Cal.3d 932, 934-940.) Here, the "third-party beneficiary" breach-of-contract claim clearly came from the same nucleus of operative facts as the other claims based on the landslide. The good news for Finnegan was that, for statute of limitations purposes, his new claim did indeed relate back to the initial filing. The bad news, however, was that, for five-year purposes, it also related back to the initial filing. It could not be considered a "new claim." Time to bring it to trial also began May 26, 1998.

B. *No Requirement of Tolling*

Finnegan proffers four subtheories to support his contention that it was an abuse of discretion for the trial court not to toll or extend the five-year period: (1) the case went out of the court's inventory, i.e., went "off calendar"; (2) frequent transfers of the cases prevented the case from being heard; (3) attorney neglect; and (4) consolidation. None of these justifications are sufficient.

1. The Inventory Question

The computation of time for purposes of the five-year rule will exclude certain periods of time provided one of three scenarios are present: (1) the court loses jurisdiction for some period; (2) the matter was postponed; or (3) "bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Code Civ. Proc. §583.340.)

Here, Finnegan argues that the five years should have been tolled because the case went off of the court's inventory of active civil cases. The argument fails under *Wilshire Bundy Corp. V. Auerbach, supra,* 228 Cal.App.3d 1280. There, the court was quite plain that removal of a case from a trial court's civil active list does not create impossibility, impracticability, or futility so as to mandate tolling the five years under section 583.340 of the Code of Civil Procedure. Under the rule stated in *Wilshire Bundy,* Finnegan had a duty of diligence to track his case and get it restored to calendar. The court explained diligence as imposing an "obligation to monitor [one's] case in the trial court to ascertain whether any filing, scheduling or calendaring errors have occurred." *(Wilshire Bundy, supra,* 228 Cal.App.3d at p.1287.)

2. The Transfers

Finnegan's second argument is that his case was transferred numerous times and heard by three different judges precluding access to a courtroom. Finnegan cites case law asserting that impossibility is created when a plaintiff is precluded access to a courtroom.

Finnegan is quite correct that lack of access to a courtroom, as such, requires tolling. (E.g., *Rose V. Scott* (1991) 233 Cal.App.3d 537, *541-542.)* The argument fails, though, because the transfers were causally unrelated to the running of the five years. Finnegan had, years before, let the case slip into the slumber of dormancy when the transfers were made; those transfers were independent of his inaction. And Finnegan's argument that the trial court itself had a sua sponte duty to insure that the case was scheduled for trial is, of course, incorrect on the law. (See *Lee V. Park* (1996) 43 Cal.App.4th *305,* 309 ["There is no legal basis for appellants' argument that the trial court had a sua sponte duty to compute the last day for trial and to set the case for trial before that date."].)

3. Attorney Neglect

Finnegan's third theory is that the five-year rule should have been tolled because of his attorney's neglect. Until the decision in *Him V. Superior Court* (1986)184 Cal.App.3d 35, there had never been a case where an attorney's illness tolled the five-year statute. In *Him*, however, the court did allow an attorney's health to justify tolling under a totality of circumstances rule. The court there held that tolling was appropriate because the plaintiff made diligent attempts to ensure that the case moved forward. *(Id.* at p.39.)

But in this case Finnegan did nothing to fill the void left by Attorney Thomason's emotional depression, a fact underscored by Finnegan's own extensive arbitration and prior litigation experience. *He* of all clients (save perhaps for those with full-scale law degrees) should have known that, at the very least, a motion to set the case for trial, or a substitution of attorneys (who would file a motion to set the case for trial), was in order to get the case moving again. And in any event Finnegan himself was certainly aware of the need for such action by February 2002 when he filed his own (almost identical) complaint in pro per.

4. Consolidation

Finally, Finnegan posits that the consolidation of the cases should have tolled the statutory time period. The law is clear, however, that "incidents of proceedings" are not excluded from the computation of time. (See *Moss V. Stockdale, Peckham & Werner* (1996)47 Cal.App.4th 494, 502; *Baccus V. Superior Court* (1989) 207 Cal.App.3d 1526, 1532.) Consolidation is a typical incident of proceeding in a lawsuit and is designed to make courts' calendars more manageable. Again, there was nothing in the court's consolidation of the 1998 matter with the 2002 matter that *caused* any inability on Finnegan's part to bring the 1998 matter to trial; even by 2002 there was still plenty of time. Unlike *General Motors V. Superior Court* (1966) 65 Cal.2d 88, relied on by Finnegan, consolidation did not make it futile to to try the first case, and in fact the second action *was* indeed tried.

Moreover, we must not forget that Finnegan *himself* filed the 2002 action to, among other things, circumvent the time trouble he was in on the 1998 action. He had the option of bringing the 1998 action to trial (and possibly simply supplementing his complaint to include the (new) landslide alleged to have occurred in February 2001), but chose to file an almost identical action. He has only himself to blame for any trouble in coordinating the consolidated action so as to bring it to trial. Indeed, it would be affirmatively inequitable, under the facts of this case, to allow any tolling for consolidation, as it would open up a loophole in the five-year statute: Instead of diligently prosecuting a case to trial, a litigant could circumvent the five-year statute by filing a succession of similar cases. Obviously, a trial judge would be within the bounds of reason to consolidate the cases. However, if consolidated, the litigant could then claim, as Finnegan has done here, that problems in bringing the consolidated case to trial prevented the timely trial of the earlier case(s).

C. *No Violation of Due Process*

Lastly we address Finnegan's argument that application of the five-year rule to the 1998 case offends due process.

First of all, no case has ever held that the mandatory dismissal statute for failure to prosecute offends constitutional guarantees of due process, and that fact itself ought to tell us something. Analogous challenges have been made to statutes of limitation and have been squarely rejected.

In *Ocean Shore RR Company V. City of Santa Cruz* (1961)198 Cal.App.2d 267, 273, the court eloquently explained the law as follows: "It has been held that a constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, if the Constitution itself does not provide otherwise. [Citations omitted.] *The power of the legislature to provide reasonable periods of limitation is unquestioned and the fixing of the time limits within which particular rights must be asserted is a matter of legislative policy.* [Citations omitted.] The only restriction as to the legislative power with respect to a statute of limitations is that it must not be so manifestly inequitable as to amount to a denial of justice...."

(Emphasis added.)

A plaintiff is given five years in which to bring a case to trial. (Code of Civ. Proc, § 583.310.) Additionally, the code provides opportunities for the time limitation to be extended. (Code of Civ. Proc., §§ 583.330 & *583.340.)* These rules permit ample time to file and complete an action, particularly since the Trial Court Delay Reduction Act (fast-track) has made commonplace the ability to bring cases to trial in Orange County *within one short year.* (Cf. *Polibrid Coatings, Inc. V. Superior Court* (2003)112 Cal.App.4th 920 [defendant served 14 months into case unduly pressured to go to trial within 10 months of that].)

We need only add that Finnegan's assertion that Judge Lewis was biased against him is not only *not* supported by the record, but affirmatively at odds with the record. Judge Lewis' written decision on the motion to dismiss was not only highly helpful to this court in understanding the case, but reflects independent research beyond just the authorities provided him by the De Franciscos. The written decision reflects a thoughtful analysis of the complexities of the case without the sort of "patronization" that Finnegan (without proof or record reference) has accused him.

IV. CONCLUSION

The judgment is affirmed. However, in view of the fact that much of the delay *was* the fault of Finnegan's attorney, we will exercise our discretion in this case to have each side bear its own costs on appeal.

SILLS, P.J.

WE CONCUR:

ARONSON, J.

IKOLA, J.